

- UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

(1) *Guidelines for Design and Construction of Hospitals*, (2) *Guidelines for Design and Construction of Outpatient Facilities*, and (3) *Guidelines for Design and Construction of Residential Health, Care, and Support Facilities* (collectively, the “FGI Guidelines” or the “Guidelines”) on a regular basis. Since 2006, FGI has ensured that the FGI Guidelines are reviewed and revised on a regular four-year development and release cycle, including new editions published in 2010, 2014, 2018, and 2022.

7. FGI was founded in 1998 for the purpose of establishing a formal process for reviewing, revising, updating, and publishing the FGI Guidelines.

8. This process involves the cooperation and collaboration of a multidisciplinary group of experts in various fields, including architecture, science, engineering, and medicine, to arrive at an independent consensus as to appropriate minimum standards.

9. FGI published its first edition of the FGI Guidelines in partnership with the AIA Press in 2001 and owns copyright registrations for each edition of the FGI Guidelines it has published since 2006. True and accurate copies of FGI’s copyright registrations for the 2018 versions of the FGI Guidelines are attached to the Complaint in this matter and hereto as Exhibits A through C. Notably, a significant number of states have adopted the FGI Guidelines, not by copying the text of the FGI Guidelines into its regulations or laws, but rather by incorporating them by reference. A true and accurate chart reflecting the current adopting states and their respective form of adoption is attached to the Complaint in this matter and hereto as Exhibit D.

10. Unlike many other standard-setting bodies, FGI is not a trade group; it does not have members, sponsors, or affiliates who provide funding by way of membership fees or dues.

11. FGI's neutrality and independence from outside influence is intentional, as it allows FGI to publish standards based on architectural and engineering principles and research alone, and not the preferences of paying members or sponsors.

12. Sales of the FGI Guidelines are FGI's only recurring source of revenue. FGI enjoys a positive reputation, and substantial credibility, among state and local government authorities, regulatory officials, as well as private enterprises, and industry experts and trade groups because of its conscious dedication to neutrality and independence in its consensus forming process.

13. FGI has considered accepting outside money to fund its operations, but has foregone such opportunities in a conscious decision to ensure that its revision process is free from the pressure that might otherwise be exerted by dependency on an external funding source.

14. It is important to FGI and its mission that FGI remain free from the pressure that might otherwise be exerted by reliance upon an external funding source, which could leverage the threat of withholding crucial operating funds to ensure that the Guidelines favor the business operations of that source.

15. Accordingly, FGI's dedication to complete independence ensures that it arrives at its standards in a candid, fair, knowledgeable, and transparent consensus process.

16. The proceeds from sales of the FGI Guidelines fund the drafting and revision process for the subsequent editions. FGI reinvests the net revenue FGI receives from sales of the FGI Guidelines to research and development for improved future editions of the FGI Guidelines. Without these sales, FGI could not continue its mission and would be unable to maintain, update, and publish future versions of the FGI Guidelines.

17. FGI charges only as much as it deems necessary for copies of the FGI Guidelines to maintain and fund its operations and all of the value-added papers and services.

18. FGI does not charge for the editions of the FGI Guidelines published in 2010, 2006 or 2001, even though they are still in use to varying degrees, and makes those copies available to the public for free. Additionally, FGI provides limited public access to current versions of the guidelines in a read-only version on the FGI website.

19. I have reviewed the versions of the FGI Guidelines published without authorization or consent from FGI on the UpCodes Website and confirmed that UpCodes, Inc. (“UpCodes”) is publishing the 2018 editions of the FGI Guidelines in a manner that is substantially identical to the 2018 editions of the FGI Guidelines.

20. The 2018 editions of the FGI Guidelines include substantial content original to FGI.

21. UpCodes has never contacted FGI, nor sought a license or other permission from FGI, to make any use of the FGI Guidelines.

22. FGI has never authorized UpCodes to make any use of the FGI Guidelines.

23. FGI receives no revenue from UpCodes’ sale of subscriptions to UpCodes’ purportedly “sophisticated code compliance platform” or from UpCodes’ publication of the FGI Guidelines.

24. By making the FGI Guidelines available at no charge, UpCodes undermines the commercial value of the FGI Guidelines and undercuts FGI’s ability to generate its own revenue through sales of the FGI Guidelines. Indeed, if the FGI Guidelines can be obtained for free from UpCodes, there is little reason to purchase a legitimate, authorized copy from FGI.

25. If FGI cannot fund its operations through sales of the FGI Guidelines, FGI must either discontinue operations, or seek funding from outside sources, which would call into question the objectivity of FGI’s recommendations and cause permanent damage to FGI’s goodwill and reputation for quality, experiential and research-based recommendations and standards.

26. In response to the COVID-19 pandemic, FGI used the revenue it earned from sales of the Guidelines to fund the research and development of *Guidance for Designing Health and Residential Care Facilities that Respond and Adapt to Emergency Conditions* (“Emergency Conditions Paper”), which was ultimately released for comment on the FGI website in March 2021 at <https://fgiguidelines.org/resource/fgi-releases-emergency-conditions-paper-opens-comment-period-for-draft-emergency-conditions-guidelines/>. This guidance document is made available to the public without charge.

27. The overarching goal of the Emergency Conditions Paper was to assist health and residential care organizations in responding to emergency events and plan mitigation strategies in anticipation of future emergency events.

28. The Emergency Conditions Paper was the result of a collaboration of 130 volunteers representing multiple disciplines in health care, residential care, and facility design, as well as other subject matter experts and the FGI staff.

29. Without funding from sales of the Guidelines, FGI would not have been able to develop the Emergency Conditions Paper, nor will it be able to develop future editions of the Guidelines.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct as I verily believe.

Executed on December 5, 2022.

A handwritten signature in dark ink, appearing to read "Douglas Erickson", written over a horizontal line.

Douglas Erickson